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November 8, 1993

Mr. William F. Caton
Acting Secretary of Federal
Communications Commission
1919 M Street, NW
Washington, DC 20054

Re: Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services (GN Docket No. 93-252)

Dear Mr. Caton:

Transmitted herewith on behalf of Telephone and Data Systems, Inc. are an original and nine copies of its Comments in the above-captioned proceeding.

In the event that there are any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

George Y. Wheeler

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Sections 3(n) and 332 of the Communications Act | ) | GEN Docket No. 93-252 |
| | ) | |
| Regulatory Treatment of Mobile Services | ) | |

To: The Commission

# COMMENTS OF
# TELEPHONE AND DATA SYSTEMS, INC.



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Its Counsel

November 8, 1993

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## SUMMARY

Telephone and Data Systems, Inc. strongly supports the Commission's initiatives in its Regulatory Treatment rulemaking. Our proposals are intended to preserve the right of any mobile service licensee to offer Commercial Mobile Services ("CMS") and/or private services over any mobile radio system. We agree with the Commission that there should not be separate allocations for CMS and private services. Rather the Commission should establish regulatory mechanisms for mobile service providers to identify and obtain approval for the types of services to be offered.

SMR services should be classified as CMS, subject to separate Commission approval in the event private services are intended to be offered.

Common Carrier/Private Paging should be classified as private in consideration of the fact that preponderance of paging system employ "store-and-forward" technologies.

Cellular radio and other common carrier radiotelephone services should be classified CMS, with option of system licensees also to private services upon prior Commission approval.

We also support the Commission's tentative conclusions with respect to specific forbearance proposals. With regard to interconnections between mobile service providers, the Commission should only require interconnection in the extremely limited circumstances described in our comments. We strongly oppose

imposition of equal access requirements on any mobile service provider.

The Commission should authorize provision of dispatch services over cellular radio and other common carrier radiotelephone systems. There are clear consumer benefits from the expansion of competition among providers in the provision of dispatch services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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To: The Commission

COMMENTS OF
TELEPHONE AND DATA SYSTEMS, INC.

Telephone and Data Systems, Inc., a telephone holding company, on behalf of itself and its subsidiaries, which include local exchange telephone companies, its cellular subsidiary, United States Cellular Corporation, and American Paging, Inc. (collectively "TDS"), by its attorneys, submits the following Comments in response to the Commission's Notice of Proposed Rule Making regarding the implementation of Sections 3(n) and 332 of the Communications Act with respect to regulatory treatment of mobile services ("NPRM").

## INTRODUCTION

The Commission has a unique opportunity in the implementation of Sections 3(n) and 332 of the Communications Act to carry forward policies supporting open entry and expanded opportunities for competition in the provision of mobile services. The consumer benefits from healthy competition and diminished regulatory burdens include development of new and

innovative services, competitive rates, expanded access and availability of the wide range of mobile services and rapid implementation of the newest and most promising technologies.

We believe that the evaluation and classification of existing and new mobile services to be designated Commercial Mobile Services ("CMS") and private services is an important deregulatory step by itself. For example, classification of paging services as private services will enhance opportunities for substantial new consumer benefits in all of the areas described above. By classifying "like" services so that they are subject to "like" regulation, the Commission will also be promoting a healthy expansion of competitive service offerings. Regulatory forbearance as applied to CMS will reduce the regulatory burdens and costs of satisfying many outdated and unnecessary regulatory requirements. Another important public benefit which should not be overlooked is the achievement of administrative efficiencies for the Commission made possible by redefining its regulatory objectives with respect to mobile services.

We strongly support the Commission's initiatives in the NPRM and have suggested in our comments specific steps to implement the statutory objectives of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). To facilitate Commission review, our comments follow the organization and order of presentation in the Commission's NPRM. In the following sections of these comments, we discuss (1) the statutory definitions of "commercial Mobile

Service" and "Private Radio Service," (2) the regulatory classifications of existing mobile services, (3) the regulatory classifications of Personal Communications services, (4) the implementation of forbearance as applied to CMS providers and (5) the right to interconnection of CMS providers.

## DISCUSSION

### I. Analysis of Statutory Definition of "Commercial Mobile Service" and "Private Mobile Service."

The Commission requests comments on how to interpret the terms, "commercial mobile service" and "private mobile service" as well as the related definitional criteria specified in Sections 3(n) and 332(d) of the Communications Act with respect to these terms. In this Section I of our comments, we address aspects of the Commission's preliminary analysis as presented in its NPRM. In Sections II and III, we describe how various existing and new services, including broadband and narrowband PCS, should be classified under the new legislation.

#### (a) "For Profit" Element of the Definition of Commercial Mobile Service

We believe that logically and realistically the for-profit element of the definition of CMS must take account of the service offering "as a whole." The fact that a provider may choose to pass through to a subscriber on a non-profit basis any charges associated with interconnection to the public switched network clearly does not change the for-profit character of the entire interconnected mobile service offering. While the Commission's

example only relates to the "interconnected" portion of the service, we believe that the for-profit character of the service would be present for classification purposes if the mobile service licensee only profited on the leasing of base station/mobile unit equipment to its subscribers or profited from a "bundled" for-profit non-radio service, such as providing on a for-profit basis telephone answering or comparable functionality. In our view, if any aspect of the entire service offering to a subscriber by a mobile service provider is for-profit, then the for-profit test has been met.

The Commission also proposes the example of a non-commercial system, i.e. a non-commercial 220-222 MHz system, which is intended to meet the internal communications of the licensee. We agree with the Commission that such internal use systems should not be considered as providing mobile services for profit. The use of excess capacity on such systems by third parties, however, presents a different situation.

The for-profit offering of excess capacity on a non-commercial mobile system should be treated no differently than mobile services offerings on systems wholly devoted to the for-profit activities. We believe, as described in a subsequent part of these comments, that the Commission should classify individual mobile service offerings so that a mobile service licensee would be permitted to provide both CMS and private services simultaneously on the same system. Offering excess capacity on a for-profit basis via a system otherwise used for non-commercial

service is encouraged under longstanding Commission policy and permitted in the Commission's rules. In order for this to take place in an environment of regulatory parity with other arguably substitutable CMS offerings, the for-profit character of the excess capacity offering must be recognized.

Shared use and multiple-licensed mobile systems have also been authorized for many years to provide services under the not-for-profit cooperative cost-sharing policies in Part 90 of the Commission's rules. The Commission has historically found that effective administration of such policies is difficult to impossible. Part 90 licensees have long objected to them as unnecessarily intrusive and burdensome. The for-profit providers of competitive mobile service offerings also have complained that these policies are ineffectual in distinguishing real non-profit operations from those that are only superficially compliant with the letter of the Commission's rules. In the interest of promoting regulatory parity, we believe the Commission should analyze all of the for-profit elements of such mobile service offerings taken as a whole. If any mobile service offering has a for-profit element, i.e. a nominally not-for-profit mobile service is bundled with a for-profit telephone answering service, then the for-profit character of the service is established.[1]

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[1] The hiring of a third party manager of a mobile system in and of itself is not evidence of the for-profit character of a shared use/multiple licensee system. The Commission should be prepared to evaluate circumstances where the third party manager has a high level of entrepreneurial involvement in the operation of the system, such as setting rates, dictating what services

(continued...)

(b) "Interconnected Service" Element of the Definition of Commercial Mobile Service

We agree with the interpretation in the Commission's NPRM (¶ 16) that "interconnected service" must provide end users the ability to control directly access to the public switched network for the purpose of sending or receiving communications. The mere fact that a mobile system may use public switched network capacity for control links or other purposes internal to the operation of the system should not result in a system being considered interconnected service for the purposes of Section 332(d) of the Communications Act.

The example of private line type services sending or receiving communications "...between limited points in the network" (NPRM, ¶ 16) does not appear to be a useful basis for defining interconnected service. Existing and emerging combinations of subscriber controlled switching and terminal devices permit the subscriber to make coordinated use of multiple networks. These increasingly prevalent arrangements mean that there is realistically no effective limit on the number of "points" where any particular subscriber communication might ultimately be sent or received. The fact that a so-called private line type service might technically terminate at one or a

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[1](...continued)
will be available, holding a direct or indirect interest in system equipment, owning or controlling the tower/antenna space or other significant involvement. If so, the for-profit character of the mobile service offering is adequately demonstrated.

few points on the public switched network does not mean that the service is not interconnected service.

The Commission also requests comment regarding prior Commission precedent concerning interconnection as applied to existing common carrier and private paging operations. In our view, paging is a special case among all of the mobile services potentially at issue here because it is a one-way service. A paging subscriber receives messages directly at his or her paging terminal. The service to the subscriber provided by a paging licensee is to send messages received at that provider's control point to the subscriber's paging terminal. The paging provider neither charges for nor furnishes the message telephone links by which paging messages are received at its control point.

In addition, unlike other two-way systems, the Commission is correct in its observation that "...there is no 'real time' link through the telephone network between the sender and the receiver of the paging message." (NPRM, ¶ 21). We believe that the Commission correctly decided in the Data Com case[2] that a message telephoned from the public switched network to an answering service and relayed via paging system to a paging subscriber was not providing interconnected service. Use of licensee-controlled "store and forward" technologies provides a similarly significant isolation of the caller from the activation of the paging transmitter. In the "store and forward" mode where the calling party cannot activate the paging transmitter from a

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[2] In re Data Com, 104 FCC 2d 1311 (1986).

position in the public switched network, the paging service involved should not be considered "interconnected service."[3]

(c) "Public Switched Network" Element of Definition of Commercial Mobile Service

We believe that the term, "public switched network," should encompass the traditional local exchange industry and all interexchange carriers directly and indirectly interconnected to the traditional local exchange carriers.

(d) Service to the "Public or "Substantial Portion of the Public" Element of the Definition of Commercial Mobile Service

We support adoption of a definition of "public" or "substantial portion of the public" which encompasses the broad based service offering to the general public traditionally made by common carriers and service offerings tailored to the needs of specified narrow classes of users. We distinguish between "narrow classes of users," which under the statutory definition should be considered a "substantial portion of the public," and "small or specialized user groups," which should not, on the basis of the individualized focus of the services provided. Service to meet the internal communications needs of a single user clearly should not be considered service to a "substantial portion of the public." Similarly, services to a small group of users who collectively arrange with a provider to meet their

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[3] The case of "direct access," i.e. real time, paging service where a caller in the public switched network could activate the paging transmitter directly from a touch-tone telephone (NPRM, Fn. 25) is distinguishable.

service requirements,[4] should not be considered service to a "substantial portion of the public." Also, we would consider customized services to a limited group of users involving use of proprietary technologies[5] as adequately individualized not to be considered service to a "substantial portion of the public."[6]

We do not believe that the system capacity by itself should be a factor in determining whether a service is available to the "public" or a "substantial portion of the public." Capacity is a mutable concept based upon the technology employed and the capacity requirements of the service involved. Any provider can adjust system capacity by altering the technology employed, i.e. changing from analog to digital modulation, or possibly adopting frequency sharing technologies employing synchronized transmissions from multiple transmitter sites and automatic power control etiquettes, to increase capacity to match the changing levels of its market share. In other words, system capacity is only remotely relevant to the "public" character of any particular mobile service offering.

The example of the traditional SMR system having a useful capacity of no more than 70 to 100 users per channel for voice

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[4] For example, all of the participating contractors in a pipeline construction project could contract for communications services along the route of the construction project.

[5] A possible example would be service involving use of proprietary encryption equipment selected by the users and operated by the service provider.

[6] Individualized negotiations between a provider and a user should not be determinative by itself of the "private" character of the service offering.

services (NPRM, ¶ 26) illustrates how system capacity is also relative to the service offerings involved. We estimate that the same traditional SMR system when configured to operate with digital emissions could meet the needs of approximately 3600 users per channel for certain data services. In other words, the limitations imposed under the Commission's rules governing bandwidth, emissions, and other aspects of system operations are not by themselves a reliable measure of the "public" scope of any particular service offering.

Similarly, service area size and location are only indirectly relevant in determining whether a service offering is available to the "public." As the Commission points out (NPRM, ¶ 27), highly localized service can still be effectively available to the public, i.e. services offered in airports, train stations, subways, sports stadiums and other comparable venues. To the extent that service area size and location are relevant at all, it should only be considered to confirm whether a small or specialized group of users is intended to be served. (See discussion above.)

(e) "Functional Equivalent" Element of the Definitions of Commercial Mobile Service and of Private Mobile Service

We support the interpretation of Section 332(d) of the Communications Act that a mobile service which does not clearly meet the statutory test for CMS should still be classified CMS if the Commission determines such service to be the "functional equivalent" of a CMS offering. (NPRM, ¶ 31). Given the overriding public interest in assuring regulatory parity among

"like" service offerings, the Commission should promote uniformity of regulatory treatment so that any member of the "public" or of any "substantial portion of the public" can rely upon the statutorily imposed consumer protections.

We discussed above how the selection of particular technologies and coverage area size and location are not determinative of the "public" character of a service offering. We believe also that Congress did not intend for the Commission to deprive "public" users of the right to rely upon statutory consumer protections merely because a mobile service provider "...does not employ frequency or channel reuse" or covers less than all of a standard metropolitan statistical area. (NPRM, ¶ 32).

Customer perception should be the "linchpin" of the Commission's evaluation of the likenesses or differences between services for which "functional equivalency" must be determined. The Commission's existing functional equivalency test[7] is adequate for this purpose.

## II. Regulatory Classification of Existing Mobile Services

In the preceding discussion of the statutory definition of CMS and private mobile services, we have described how specific service offerings could be classified as CMS or private based upon the evaluation of relevant characteristics of each such offering. Logically, this leads us to the conclusion that at any

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[7] Ad Hoc Telecommunications Users Comm. v. FCC, 680 F2d 790, 796 (D.C. Cir. 1982).

one time, CMS or private services, or both, could be offered over a mobile radio system.

We agree with the Commission that attempting to separate existing radio services into separate allocations for CMS and private services is impractical. (NPRM, ¶ 40) At the same time, it is essential that licensees have the flexibility to provide either CMS or private services, or both, for reasons which we have previously presented. We propose that the Commission initially classify existing and new radio services based on the Commission's evaluation of the characteristics of the predominant service offerings currently provided or anticipated in that radio service. We suggest below what those classifications should be, assuming that the Commission will continue to evaluate the changing service usage/characteristics of each so that if these predominant service offerings change, appropriate changes in the CMS or private classification for that radio service can also be adopted.

An essential element of our approach is to preserve the right of any mobile service licensee to offer both CMS and private services. For example, a common carrier land mobile licensee might in certain circumstances also offer private services and should not be precluded from doing so. The regulatory mechanism to preserve this option already exists and has operated successfully for many years in the Common Carrier Satellite Radio Services. Satellite carriers have been

authorized to operate transponder capacity, on a common carrier or private basis, or both.[8]

The Commission should provide licensing procedures to authorize services to be offered other than those covered by the predominant CMS or private classification for the radio service involved. In the case of service offerings based upon PCS technologies, those mechanisms should be established as promptly as possible. See our discussion of PCS application filing procedures in Section III, infra. The Commission may want to defer consideration of the comparable mechanisms applicable to other services to a further notice of proposed rulemaking in these proceedings.

(a) SMR Services Should Be Classified As Commercial Mobile Services.

We believe that the predominant for-profit use, the extended user eligibility and the widespread provision of "interconnected service" justifies the classification of SMR services as CMS. As described above, this initial classification would not prevent any licensee or applicant from demonstrating to the Commission that all or some part of the system capacity will be devoted to private services.

The fact that individual SMRs do not offer wide-area service or do not employ frequency reuse should not be a dispositive

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[8] Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), att'd sub nom. Wold Communications, Inc. v. FCC. 735 F2d 1465 (D.C. Cir. 1984)

basis for qualifying as a private service. Nor should the provision of traditional dispatch services or of services to specialized user groups be automatically classified as private. We have previously described how the Commission should evaluate the "public" availability of any particular service. The fact that a narrow group of potential users is involved does not necessarily diminish the "public" availability of the service as defined in the Act.

Also there may be circumstances where an SMR service is not interconnected to the public switched network and still should be classified as CMS. For example, we believe that extensive SMR systems predominantly or exclusively used for data services, such as the network operated by RAM Mobile Data, should be considered CMS even if they technically are not interconnected to the public switched network. While the determination of whether a particular service is a "functional equivalent" of CMS must depend on the facts of the case, the Commission must be prepared to find that the "public" availability of data services does not necessarily require access to traditional local exchange or interexchange public switched networks.

(b) Common Carrier Paging And Private Carrier Paging Services Should Be Classified Initially As Private.

We have described above how existing paging services are unique among the mobile services involved here and how the use of manual or "store-and-forward" technologies isolate the paging system from the public switched network. As a mobile service not considered to be an "interconnected service" for the purposes of

Section 332(d) of the Communications Act, paging should be classified as private.

We expect that others will argue for CMS classification, not that they disagree with us on the facts, but because they are concerned that a private classification will diminish the paging licensee's right to enter into cost-based interconnection arrangements with the local exchange carriers on whom they rely for assignment of DID trunks. We agree that continued access to DID trunks is important from a business perspective. We disagree that such considerations should be the occasion for expanding the definition of "interconnected service" under Section 332 (d) of the Communications Act to encompass methods of communication, including manual recording of paging messages or use of "store-and-forward" facilities.

We believe that the appropriate way of assuring fair and cost-effective interconnection arrangements to paging licensees is for the Commission to establish policies and procedures to protect the rights of paging licensees to interconnection including the assignment of DID trunks. We agree that the Commission's authority to require common carriers to provide interconnection to private entities is well settled. (NPRM, ¶ 72). With respect to the type of interconnections offered to paging licensees providing private services and the rates for such interconnections, we interpret the Commission's statutory authority as adequately broad to assure that paging subscribers

are not unfairly burdened by costs for local exchange provided DID trunks.

(c) Cellular And Other Common Carrier Radiotelephone Commercial Mobile Services.

While there is very little discussion of the point, we do agree with the Commission's view that existing common carrier mobile services providing interconnected radiotelephone service to the public, such as cellular radio and others, should be classified CMS. As discussed above in connection with SMR services, the fact that a common carrier mobile system may have limited capacity or only serve a small area should not be dispositive in evaluating whether services of a particular license should be classified private.

We strongly support the elimination of the dispatch prohibition as currently applied to common carriers. Dispatch service can be implemented on frequencies currently allocated for common carrier radio services using established technologies. There are also important benefits for users in being able to obtain dispatch services from the same providers that provide a full range of other services. Users also will benefit from price competition, expanded coverage, and incentives to create enhanced variations on basic dispatch capabilities.

We do not believe that dispatch services are inherently private under the terms of Section 332(d) of the Communications Act. Classification should be evaluated on the basis of the terms and conditions of the specific service offerings and could be classified CMS or private. If the Commission finds that

dispatch appropriately should be classified as private, licensees of cellular and common carrier mobile systems should in any event be permitted to provide dispatch services, i.e. designated private, as well as CMS offerings.

(d) 220-222 MHz Services Should be Classified Based Upon Their "Commercial" And "Non-commercial" Licensing Status.

We agree with the Commission that for-profit interconnected commercial 220-222 MHz systems should be classified initially as CMS and that non-commercial 220-222 MHz systems should be classified as private.

III. Regulatory Classification of Personal Communications Services.

We support the Commission's tentative conclusion that "...no single regulatory classification should be applied to all PCS Services." (NPRM, ¶44). We have described in the preceding sections of these comments how the Commission should allow providers to use mobile systems to provide CMS and/or private services. This means that a mobile system would be permitted to support CMS and/or private services with all or any portion of the system capacity, subject to whatever application or other regulatory mechanisms the Commission deems appropriate.

The CMS and private services should be permitted to be offered via broadband and narrowband PCS technologies under flexible regulatory procedures which allow the PCS licensee broad authority to offer services which are responsive to the full range of user requirements. As in the example of satellite transponder services discussed in the preceding Section II, the

Commission appropriately could decide that some threshold level of CMS must be provided on broadband PCS systems, particularly those operating with channel blocks individually or in the aggregate totalling 20 MHz or more spectrum. Given the relatively diminished overall capacity of broadband systems operating with 10 MHz channel blocks and of narrowband PCS systems operating with a fraction of the spectrum available to broadband systems, such systems should not be required to set aside capacity for CMS.

Application filing procedures for initial licensing of broadband and narrowband systems should be simplified as much as possible to expedite processing. In the Commission's Competitive Bidding docket, the Commission suggests that applicants for PCS systems might use FCC Form 401 or FCC Form 574, or both, to cover CMS and/or private services. (Competitive Bidding NPRM, ¶128.) We think this procedure is unnecessarily complex and confusing. It also tends to perpetuate undesirable regulatory disparities such as in the area of financial showings.

We believe that the Commission should choose a standard application form, either FCC Form 401 or 574, for all broadband and narrowband PCS filings. The application processing requirements and filing fees should be the same for all applicants whether they propose CMS or private services, or both. This is fair, easily understood and gives adequate recognition to the fact that the licensees of such systems have the flexibility during the license term to offer service (CMS or private) which

may not have been contemplated at the time of initial licensing. If the Commission decides to require a threshold level of CMS as discussed above, the Commission could require a broadband PCS licensee proposing to establish private services for the first time or to expand capacity devoted to private services to file an application for modification of license as a precondition to offering such services. This procedure has been successfully implemented in connection with common carrier and private offerings of satellite communications services and could be a model for adoption of comparable procedures here.

## IV. Implementation Of Forbearance Authority As Applied To Commercial Mobile Services Providers.

We strongly believe that while "...differential regulation of providers of Commercial mobile services is permissible" (NPRM, ¶53), the flexibility inherent in this language from the Conference Report for the Budget Act should not be interpreted so as to undercut fundamental regulatory parity concepts. CMS offerings which are identical or "functional equivalents" should be treated the same for regulatory purposes.[9] We strongly disagree with the Commission's tentative conclusion that this language of the Conference Report authorizes the Commission to "...establish regulatory requirements that differ for individual service providers within a class." (NPRM, ¶54; Emphasis supplied)

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[9] In this connection, the Commission should define the term, "consumer," for the purposes of Section 332(c) of the Communications Act as including business users as well as members of the general public.